

RECORDING REQUESTED BY:

Union Pacific Railroad Company
Attn: Tony K. Love
Assistant Vice President Real Estate
1400 Douglas Street, Mail Stop 1690
Omaha, NE 68179

WHEN RECORDED, MAIL TO:

ADDRESS ABOVE, and,

State of California
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento California 95826
Attention: James L. Tjosvold, Chief
Northern California – Central Cleanup
Operations Branch

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

COVENANT TO RESTRICT USE OF PROPERTY
ENVIRONMENTAL RESTRICTION

(RE: San Joaquin County Assessor Parcel Numbers
145-20-10; 145-20-11; 145-20-12; and 145-20-13)

DTSC Site Code 100108

This Covenant and Agreement ("Covenant") is made by and between the Union Pacific Railroad Company, (the "Covenantor"), the current owner of property situated in Stockton, County of San Joaquin, State of California, described in Exhibit "A" attached hereto and incorporated herein by this reference (the "Property"), and the Department of Toxic Substances Control (the "Department"). Pursuant to Civil Code section 1471, the Department has determined that this Covenant is reasonably necessary to protect present or future human health, safety, or the environment as a result of the presence on the land of hazardous materials as defined in Health and Safety Code section 25260. The Covenantor and the Department, collectively referred to as the "Parties", hereby agree, pursuant to Civil Code section 1471 and Health and Safety Code section 25355.5 that the use of the Property be restricted as set forth in this Covenant. The

Parties further intend that the provisions of this Covenant also be for the benefit of, and be enforceable by, the United States Environmental Protection Agency ("U.S. EPA") as a third party beneficiary.

ARTICLE I

STATEMENT OF FACTS

1.01. The Property. The Property, totaling approximately 8-acres, is more particularly described in Exhibit "A" (Legal Description) and illustrated in Exhibit "B" (Parcel Map) [\[Exhibits to be provided by Covenantor\]](#), attached hereto and incorporated herein by this reference. The Property is located in an industrial area near the Port of Stockton and is located within the McCormick and Baxter Superfund Site. The Property is bounded on the North by the McCormick and Baxter owned property and Old Mormon Slough, on the East and South by Washington Street and on the West by the McCormick and Baxter Company property. The Property is also generally described as San Joaquin County Assessor's Parcel Numbers (APN); 145-20-10; 145-20-11; 145-20-12; and 145-20-13.

1.02. Hazardous Substances. Hazardous substances, as defined in section 25316, Chapter 6.8, Division 20 of the California Health and Safety Code, Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. section 9601(14); and 40 Code of Federal Regulations parts 261.3 and 302.4 (1997), remain on portions of the Property. Groundwater beneath the Property is contaminated with pentachlorophenol, dioxin, polycyclic aromatic hydrocarbons, arsenic, and chromium. In addition, non-aqueous phase liquids, attributable to creosote and petroleum oils are widespread beneath the site. Sediment in Old Mormon Slough adjacent to the site is also contaminated, primarily with polycyclic aromatic hydrocarbons and dioxin.

1.03. Remediation of the Property. The Property remediation is in accordance with the terms and requirements of the Consent Decree entered into between U.S. EPA, the Department and the Covenantor. [\[Reference the CD\]](#) These actions are a part of the

overall remediation of the McCormick and Baxter Superfund Site. The McCormick and Baxter Superfund Site remediation is pursuant to the Record of Decision (ROD) for the site issued by the U.S. EPA, dated March 31, 1999. Under the ROD, the U.S. EPA Region IX Superfund Division Director selected remedial actions for the property pursuant to CERCLA. The Department concurred with this remedy.

1.04. Land Use Covenant. The ROD provides for a land use covenant limiting the future use of the Property to industrial/commercial uses only. A land use covenant is necessary to preclude potential residential user's exposure to hazardous substances which will remain at the Property once soil remediation is complete, to preclude disruption of the response actions and to limit potential exposure to hazardous substances identified in groundwater beneath the Property. U.S. EPA, with the concurrence of the Department, has concluded that the Property, as remediated, and subject to the restrictions of this Covenant, does not present an unacceptable threat to human safety or the environment.

ARTICLE II

DEFINITIONS

2.01. Department. "Department" means the California Department of Toxic Substances Control and includes its successor agencies, if any.

2.02. U.S. EPA. "U.S. EPA" means the United States Environmental Protection Agency and includes its successor agencies, if any.

2.03. Owner. "Owner" means the entity with valid title or other real property interest to all or any portion of the Property.

2.04. Occupant. "Occupant" means any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

2.05 CERCLA Lead Agency. "CERCLA Lead Agency" means the governmental entity having the designated lead responsibility to implement response action under the

National Contingency Plan ("NCP"), 40 C.F.R. Part 300. U.S. EPA or a state agency acting pursuant to a contract or cooperative agreement executed under CERCLA section 104(d)(1), 42 U.S.C. 9604(d)(1), or designated pursuant to a CERCLA Memorandum of Agreement entered into under subpart F of the NCP (40 C.F.R. 300.505) may be designated CERCLA Lead Agency.

2.06 Environmental Restrictions. "Environmental Restrictions" means all protective provisions, covenants, restrictions, prohibitions, and terms and conditions as set forth in any section of this Covenant.

2.07 Improvements. "Improvements" include, but are not limited to: buildings, structures, roads, driveways, improved parking areas, wells, pipelines, or other utilities.

2.08 Lease. "Lease" means lease, rental agreement, or any other document that creates a right to use or occupy any portion of the Property.

2.09 Remedial Systems. "Remedial Systems" shall mean the remedial equipment and systems located on the Property, including devices that may be installed in the future, groundwater monitoring wells, groundwater extraction wells and associated infrastructure such as piping.

ARTICLE III

GENERAL PROVISIONS

3.01. Restrictions to Run with the Land. This Covenant sets forth Environmental Restrictions, that apply to and encumber the Property and every portion thereof no matter how it is improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. This Covenant: (a) Runs with the land pursuant to Health and Safety Code section 25355.5(a) and Civil Code section 1471; (b) Inures to the benefit of and passes with each and every portion of the Property; (c) Is for the benefit of, and is enforceable by the Department, and by the U.S. EPA as a third party beneficiary; and (d) Is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof.

3.02. Binding upon Owners/Occupants. Pursuant to Health and Safety Code, this Covenant binds all owners of the Property, their heirs, successors, and assignees, and the agents, employees, and lessees of the owners, heirs, successors, and assignees. Pursuant to Civil Code section 1471, all successive owners of the Property are expressly bound hereby for the benefit of the Department and U.S. EPA.

3.03. Written Notice of the Presence of Hazardous Substances. Prior to the sale, lease, assignment, or other transfer of the Property, or any portion thereof, the Owner, lessor, or sublessor shall give the buyer, lessee, or sublessee written notice of the existence of this Covenant and its Environmental Restrictions.

3.04. Incorporation into Deeds and Leases. The Covenant and its Environmental Restrictions shall be incorporated by reference in each and every deed and Lease for any portion of the Property.

3.05. Conveyance of Property. The Owner shall provide notice to the Department not later than thirty (30) days after any conveyance of any ownership interest in the Property (excluding mortgages, liens, and other non-possessory encumbrances). The written notice shall include the name and mailing address of the new owner of the Property and shall reference DTSC Site Code 100108. The notice shall also include the Assessor's Parcel Number (APN) listed in Section 1.01. If the new owner's property has been assigned a different APN, each such APN that covers the Property must be provided. The Department and U.S. EPA shall not, by reason of this Covenant, have authority to approve, disapprove, or otherwise affect proposed conveyance, except as otherwise provided by law, by administrative order, or by a specific provision of this Covenant.

ARTICLE IV

RESTRICTIONS

4.01. Prohibited Uses. The Property shall not be used for any of the following purposes:

- (a) A residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation.
- (b) A hospital for humans.
- (c) A public or private school for persons under 21 years of age.
- (d) A day care center for children.
- (e) A long-term care facility for the elderly, handicapped, or infirm.
- (f) Any other purpose involving residential occupancy on a 24-hour basis.

4.02. Soil Management. Any contaminated soils brought to the surface by grading, excavation, trenching or backfilling shall be managed in accordance with all applicable provisions of state and federal law and will not be removed from the Property without a Soil Management Plan approved by the CERCLA Lead Agency, such approval not to be unreasonably withheld.

4.03. Prohibited Activities. The following activities are specifically prohibited without prior written approval from the CERCLA Lead Agency:

- (a) Drilling for drinking water, oil, or gas.
- (b) Extraction of groundwater for purposes or uses other than site remediation.
- (c) Alteration of existing drainage patterns as anticipated or constructed as part of the Remedial System.
- (d) Creation of significant topographic low areas where water may pond, including accessory structures, swimming pools and spas.

For purposes of this subsection, prior written approval from the CERCLA Lead Agency shall not be unreasonably withheld, and shall not be withheld if the activities in question do not disturb or interfere with the Remedial Systems.

3.04. Non-Interference with Remedial Systems.

- (a) The Owner and Occupant shall refrain from, and shall not permit, any activity that would interfere with the operation of the Remedial Systems or other Site-wide response activities at the Property without prior written approval from the

CERCLA Lead Agency, such approval not to be unreasonably withheld.

- (b) All uses and development of the Property shall preserve the integrity of the Remedial Systems or other Site-wide response activities.
- (c) Owner shall provide a copy of this Covenant to all easement holders for all or any portion of the Site.

4.05. Access for Department and the U.S. EPA. The Department shall have reasonable right of entry and access to the Property for inspection, monitoring, and other activities for the Remedial Systems on the Property consistent with the purposes of this Covenant as deemed necessary by the Department in order to protect the public health or safety, or the environment subject to the requirement that all such persons with access to the Property shall comply with all safety rules and requirements in place for Owner's or Occupant's own personnel, and that such persons provide their own personal protective equipment as required by those safety rules. Nothing in this instrument shall limit or otherwise affect U.S. EPA's right of entry and access, or EPA's authority to take response actions, under CERCLA; the National Contingency Plan, 40 Code of Federal Regulations Part 300 (1997) and its successor provisions; or federal law. Nothing in this instrument shall limit or otherwise effect the Department's right of entry and access, or authority to take response actions, under CERCLA; the National Contingency Plan, 40 Code of Federal Regulations Part 300 (1997) and its successor provisions; Chapter 6.8, Division 20 of the California Health and Safety Code; California Civil Code, or other applicable State Law.

4.06 Access for Implementing Operation and Maintenance. The entity, person or persons responsible for implementing the operation and maintenance activities related to the Remedial Systems may have reasonable right of entry and access to the Property for the purpose of implementing these operation and maintenance activities. Such right of entry and access shall continue until such time as the CERCLA Lead Agency determines that such activities are no longer required.

ARTICLE V
ENFORCEMENT

5.01. Enforcement. Failure of the Covenantor, Owner or Occupant to comply with any of the Restrictions shall be grounds for the Department to require modification or removal of any Improvements constructed or placed upon any portion of the Property in violation of this Covenant. Violation of this Covenant, including but not limited to, failure to submit, or the submission of any false statement, record or report to the Department shall be grounds for the Department to pursue administrative, civil or criminal actions.

ARTICLE VI
VARIANCE, TERMINATION, AND TERM

6.01. Variance. Owner, or any other aggrieved person, may apply to the Department for a written variance from the provisions of this Covenant. Such application shall be made in accordance with Health and Safety Code section 25233. Unless and until the State of California assumes CERCLA Lead Agency responsibility for Site operation and maintenance, no variance may be granted under this paragraph without prior review and prior concurrence of the variance by U.S. EPA. Any approved variance shall be recorded in the land records by the person or entity granted the variance.

6.02 Termination. Owner, or any other aggrieved person, may apply to the Department for a termination or modification of one or more terms of this Covenant as they apply to all or any portion of the Property. Such application shall be made in accordance with Health and Safety Code section 25234. Unless and until the State of California assumes CERCLA Lead Agency responsibility for Site operation and maintenance, no variance may be granted under this paragraph without prior review and prior concurrence of the termination by U.S. EPA. The written statement of termination of the Restriction or other terms of this Covenant shall be recorded in the land records by the person or entity granted the termination.

6.03 Term. Unless ended in accordance with the Termination paragraph above, by law, or by the Department in the exercise of its discretion, this Covenant shall continue in effect in perpetuity.

ARTICLE VII

MISCELLANEOUS

7.01. No Dedication Intended. The Covenantor entered into this Covenant as part of a resolution with the Department and U.S. EPA of its alleged liabilities for the Property. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property, or any portion thereof to the general public or anyone else for any purpose whatsoever. Further, nothing in this Covenant shall be construed to effect a taking under state or federal law.

7.02. Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, in the County of San Joaquin within ten (10) days of receipt of a fully executed original.

7.03. Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served, or (2) three (3) business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

To Owner: Union Pacific Railroad Company
 c/o James Levy, Project Coordinator
 9451 Atkinson St., Suite 100
 Roseville, CA 95747-9711

and

Robert C. Bylsma, Esq.
Regional Environmental Counsel

Union Pacific Railroad Company
10031 Foothills Boulevard, Suite 200
Roseville, California 95747-7101

To Department: James L Tjosvold, P.E., Chief
Northern California-Central Cleanup Operations Branch
Site Mitigation and Brownfield Reuse Program
California Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento CA 95826-3200

To U.S. EPA: U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105-3901
Attn. Ms. Marie Lacey

Any party may change its address or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph.

7.04. Partial Invalidity If any portion of the Restrictions or other term set forth herein is determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.

7.05. Construction. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

7.06 Statutory References. All statutory references include successor provisions.

7.07 Reporting Requirements. The Owner must, promptly and within twenty (20) days of discovering a violation of this Covenant, send to the Department and U.S. EPA

a report of the circumstances of this violation, if known. If the Owner caused the violation, the Owner must immediately cease activities causing that violation and make repairs as necessary.

7.08 Third Party Beneficiary. U.S. EPA's rights as a third party beneficiary shall be construed pursuant to traditional principles of contract law and under the statutory and common law of the state of California.

IN WITNESS WHEREOF, the Parties execute this Covenant.

Union Pacific Railroad Company:

By: _____ Date: _____

Tony K. Love
Assistant Vice President Real Estate
Union Pacific Railroad Company

Department of Toxic Substances Control

By: _____ Date: _____

James L. Tjosvold, P.E., Chief
Northern California-Central Cleanup Operations Branch
Department of Toxic Substances Control

U.S. Environmental Protection Agency as a Third Party Beneficiary

By: _____ Date: _____

Keith Takata, Director
Superfund Division, Region 9
United States Environmental Protection Agency

STATE OF CALIFORNIA)

)

COUNTY OF _____)

On this _____ day of _____, in the year _____,

before me _____, personally appeared

_____,

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is /are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Notary Signature _____

Notary Public